(2)

No. 90-1401

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

ANR PIPELINE COMPANY,

Petitioner,

v.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
(EXXON CORPORATION, real party in interest),

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the District Court and Court of Appeals erred in requiring Petitioner to produce documents responsive to Respondent's discovery requests where Petitioner's claim of privilege was based upon the Federal Energy Regulatory Commission's decision to exempt the documents from mandatory public disclosure under the Freedom of Information Act.

LIST OF PARTIES

The parties to the proceedings below were the petitioner ANR Pipeline Company, respondent United States District Court for the Southern District of Texas and real party in interest Exxon Corporation.

Exxon Corporation has the following subsidiary corporations which it does not wholly own:

Al-Jubail Petrochemical Company
Altona Petrochemical Company Limited
Associated Oil Company (Kyneton) Pty. Ltd.
Atlas Supply Company of Canada Limited
Australian Synthetic Rubber Company Limited
BEB Erdgas und Erdoel GmbH, Hannover
BRIGITTA Erdgas und Erdoel GmbH, Hannover
BT Asia Securities Limited
Beaverhill Resources Limited
Byron Creek Collieries (1983) Limited
Canadian Reserve Oil & Gas Ltd.
Cascade Fertilizers (1990) Limited
Castle Peak Power Company Limited
Champlain Oil Products Limited
Clermont Coal Mines Limited
Comcor Chemicals Limited
Commercial Polymers Pty. Ltd.
Compagnie d'Etancheite Africaine en Cote d'Ivoire S.S.
Compania Minera Disputada de Las Condes S.A.
Comptoir Oyonnaxien des Combustibles (C.O.C.)
Devon Estates Limited
E S F Limited
ERC Malaysia Inc.
Elwerath Erdoel und Erdgas AG
Elwerath Erdgas und Erdoel GmbH, Hannover
Esso Chemical Alberta Limited
Esso Energie G.I.E.

LIST OF PARTIES – Continued

Esso Exploration and Production Angola Inc.
Esso Exploration and Production Ireland Limited
Esso Lub'Services
Esso OIL Tankstellen Gesellschaft m.b.H.
Esso Malaysia Berhad
Esso of Canada Limited
Esso (Overseas) Pension Trust Limited
Esso Portuguesa, S.A.
Esso Resources Canada (an Alberta limited partnership)
Esso Resources Canada Limited
Esso Resources Enterprises Ltd.
Esso Resources N.W.T. Limited
Esso Resources (1989) Ltd.
Esso Resources Properties Inc.
Esso Resources Ventures Limited
Esso Societe Anonyme Francaise
Esso Standard Algerie S.A.
Esso Standard Tunisie S.A.
Esso Technologies et Services (E.T.S.)
Etablissements Cloarec
Exxon Chemical Pakistan Limited
Exxon de Colombia S.A.
Exxon Supply Company
Gewerkschaft Brassert Erdoel und Erdgas GmbH
Gewerkschaft Erdoel-Raffinerie Deurag-Nerag
Gewerkschaft Gute Hoffnung Erdgas und Erdoel GmbH
Groupement Liants Routiers du Gard Esso-Viafrance (G.L.R.G.E.V.)
Groupement Petrolier du Finistere G.I.E.
Heinrich Schneider Spedition GmbH
Hong Kong Pumped Storage Development Company, Limited
Kai Tak Refuellers Company Limited

LIST OF PARTIES – Continued

Karlsruhe-Stuttgart Rohrleitung Gesellschaft mbH
Imperial Oil Limited
Imperial Pipe Liine Company, Limited, The
Japan Butyl Company Limited
Jersey Nuclear-Avco Isotopes, Inc.
K.K. Eastern Gas Terminal
Kowloon Electricity Supply Company Limited
Maple Leaf Petroleum Limited
Mainline Pipelines Limited
McColl-Frontenac Inc.
McColl-Frontenac Oil Co. Ltd.
Metro Fuel Co. Ltd.
Mr. Lube Canada Inc.
Mytex Polymers Incorporated
Near East Development Corporation
Nederlandse Aardolie Maatschappij B. V.
Nisku Products Pipe Line Company Limited
Norddeutsche Mineraloelwerke Stettin G.m.b.H.
Noroxo
107580 Canada Inc.
151742 Canada Inc.
159129 Canada Inc.
160440 Canada Limited
160837 Canada Limited
165899 Canada Limited
165548 Canada Limited
165549 Canada Limited
165550 Canada Limited
168211 Canada Limited
OSLO Alberta Limited
Office Prive d'Assurances et de Courtages
Oil Field Chemicals Company (Saudi Arabia) Ltd.
P.A.C. S.A.R.L. (Pinson-Allegret-Causse)
P. T. Stanvac Indonesia
Peninsula Electric Power Company Limited
Primaer Oel GmbH

LIST OF PARTIES – Continued

Refineria Petrolera Acajutla, S.A.
S.A.R.L. Viain
Servacar Ltd.
Smiley Gas Conservation Limited
Sociedad de Inversiones de Aviacion
Societe d'Exploitation & de Developement d'Operations Commerciales
Societe du Caoutchouc Btyl (SOCABU)
Societe Esso de Recherches et d'Exploitation Petrolieres Esso Rep
Societe Francaise EXXON CHEMICAL
Societe Hoteliere de la Petite Campagne
Societe Immobiliere Paris-Niel
Societe Ivoirienne d'Operations Petroliers S.A.
Societa per Azioni Raffineria Padana Olii Minerali-SARPOM
Socony-Standard-Vacuum Oil Company (Petroleum Maatschappij)
Southern Natural Gas Development Pty. Ltd.
369772 Alberta Inc.
363011 Alberta Limited
393193 Alberta Inc.
TBN Tanklager-Betriebsgesellschaft Nuernberg mbH
TIBA Speditions GmbH
Thai Aliphatics Company Limited
Tonex Company Limited
Winnipeg Pipe Line Company Limited
Worex S.N.C.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

1. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Petitioner, ANR Pipeline Company ("ANR"), is seeking review of an interlocutory discovery order entered by Respondent the United States District Court for the Southern District of Texas on June 15, 1990, compelling ANR to produce certain documents to the real party in

interest, Exxon Corporation ("Exxon"). On July 14, 1989 Exxon served its First Set of Interrogatories, Requests for Admission, and Request for Production of Documents on ANR in accordance with Rules 33, 34, and 36 of the Federal Rules of Civil Procedure. (Appendix to Petition for Writ of Certiorari [hereinafter "A.P."] at p. 6a). As a part of the request for production of documents Exxon specifically requested that ANR produce certain documents it filed with the Federal Energy Regulatory Commission ("FERC") in a FERC proceeding. ANR objected to the production of these documents.

On May 16, 1990 Exxon moved to compel the production of these documents. (A.P. 12a). On June 6, 1990 ANR moved the district court for a protective order. The district court granted Exxon's motion to compel on June 15, 1990. (A.P. 1a). On July 15, 1990 ANR moved the district court to reconsider its order. (A.P. 20a). The district court denied ANR's motion for reconsideration on September 11, 1990. (A.P. 3a). ANR petitioned the United States Court of Appeals for the Fifth Circuit for a writ of mandamus on October 10, 1990, and on October 12, 1990 the court of appeals denied ANR's petition for writ of mandamus. (A.P. 1a). ANR petitioned for rehearing on October 26, 1990 and on November 14, 1990 the Fifth Circuit denied ANR's petition for rehearing. (A.P. 5a).

Exxon filed a second motion to compel production of the documents, and on February 27, 1991, the district court granted this motion and ordered ANR to produce the documents within 15 days. ANR filed a motion to stay the district court's order in the Fifth Circuit, and the motion to stay was denied on March 12, 1991. ANR then filed a motion to stay in this Court, and Justice Scalia

denied the motion on March 13, 1991. The 15-day period for production of the documents, as ordered by the district court, expired on March 14, 1991. ANR has begun producing these documents to Exxon. ANR filed its petition for writ of certiorari seeking review of this discovery order on February 12, 1991.

2. STATEMENT OF FACTS

Exxon, a producer of natural gas, and ANR, an interstate gas pipeline, are parties to three gas purchase contracts which form the basis for this litigation. Exxon contends that ANR has failed to comply with various provisions of those contracts including provisions requiring that certain quantities of gas be taken or paid for whether or not taken ("take or pay" provisions). In response ANR claims, *inter alia*, that it is relieved of these obligations as a result of alleged "system-wide" force majeure and that it has not incurred any take or pay liability to Exxon or to numerous other producers from June 1985 to the present.

Exxon instituted suit against ANR and one of its affiliates in the United States District Court for the Southern District of Texas on March 20, 1989. Exxon was aware of filings made by various pipelines with the FERC that directly contradict these pipelines' claims that they have no take or pay liability to Exxon, and Exxon requested copies of similar filings from ANR.

In order to avoid potential objections relating to confidential material requested by both parties in their discovery requests, Exxon and ANR jointly requested the entry of a protective order covering material produced in

the course of discovery. The district court entered this protective order and it continues in force and effect in the case.

REASONS FOR DENYING THE WRIT

1. THE PETITION IS MOOT.

As a result of denial of ANR's motions for stay in the district court, court of appeals, and in this Court through Justice Scalia and ANR's subsequent production of the requested documents, this cause is moot. *See, e.g., C & C Products, Inc. v. Messick,* 700 F.2d 635 (11th Cir. 1983) (holding appeal from order compelling production moot after production pursuant to court order). ANR produced the documents after filing its petition in this Court, and the issues raised in the petition are moot. Therefore consideration of the petition is inappropriate.

2. THE QUESTION PRESENTED BY THIS INTERLOCUTORY PETITION IS NOT APPROPRIATE FOR THIS COURT'S REVIEW.

ANR is seeking interlocutory review of a district court's decision on a discovery motion. This Court has noted that it "should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T. & K. Ry Co.,* 148 U.S. 372, 384 (1893). This case presents no such extraordinary circumstances.

In addition, Exxon strenuously disagrees with ANR's contention that the issues presented here are "of national importance to the natural gas industry." (Petition at p. 2). This petition deals only with Exxon's right to pretrial discovery of certain material and ANR's assertion of alleged privileges against such discovery. As noted by the Court of Appeals for the Second Circuit in reviewing similar claims of privilege, "these cases arose in the course of discovery, where the Rules of Civil Procedure leave much to the judges' discretion." *United States v. Noall*, 587 F.2d 123, 126 (2d Cir. 1978), *cert. denied*, 441 U.S. 923 (1979).

Requiring ANR to continue to produce the material in compliance with the district court's order will not adversely affect the natural gas industry, but will simply allow this case to proceed to its conclusion. The protective order already entered in the case prevents the general dissemination of the requested information. Since review of the material is limited to counsel and parties involved in this litigation, ANR's dire prediction about the effect of the lower court's discovery rulings on the price of gas at the burner tip is unjustified. ANR's invitation to review this discovery dispute should be declined.

3. THERE IS NO CONFLICT BETWEEN THE COURTS OF APPEALS.

There is no conflict between the decision of the United States Court of Appeals for the Fifth Circuit and the United States Court of Appeals for the District of Columbia Circuit. Contrary to ANR's arguments, the Court of Appeals for the District of Columbia did not

address the issues presented here in deciding *American Gas Association v. FERC*, 912 F.2d 1496 (D.C. Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3470-1 (U.S. Nov. 21, 1990) (No. 90-806).

In *American Gas Association*, the court of appeals, in a single footnote, upheld *"the [Federal Energy Regulatory] Commission's* decision to not release the raw data about individual settlements" in its rule making proceeding. *American Gas Association*, 912 F.2d at 1508 n.3 (emphasis added). The court of appeals did not address the issue of whether a *pipeline* is required to produce its filings to a producer in an *unrelated civil action*. In fact, such discovery has been allowed in a number of cases. *Exxon Corp. v. El Paso Natural Gas Co.*, No. MO-88-CA-130 (W.D. Tex. Dec. 28, 1988); *Exxon Corp. v. Transwestern Pipeline Co.*, No. 89-011331 (Dist. Court Harris County, Texas 127th Judicial District, Sharolyn P. Wood); *Transwestern Pipeline Co. v. The Honorable Sharolyn P. Wood*, No. 14-90-00127-CV (Tex. App. – Houston [14th Dist.], Mar. 22, 1990), *reh'g denied* (April 19, 1990) (orig. proceeding); *Transwestern Pipeline Co. v. The Honorable Sharolyn P. Wood*, 34 Tex. Sup. Ct. J. 167 (Dec. 19, 1990) (orig. proceeding); *Transwestern Pipeline Co. v. The Honorable Sharolyn P. Wood*, No. 14-91-00003-CV (Tex. App. – Houston [14th Dist.], Jan. 28, 1991) (orig. proceeding).

ANR's attempt to create a conflict between courts of appeals ignores the statutory and regulatory treatment accorded to ANR's filings with the FERC. ANR was allowed to request protection from mandatory public disclosure of information under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. This procedure for exemption from mandatory disclosure under the FOIA does not

purport to create any privilege against discovery under the Federal Rules of Civil Procedure. As 18 CFR § 388.112 states:

> (a) *Scope.* Any person submitting a document to the commission may request privileged treatment by claiming that some or all of the information contained in a particular document is *exempt from the mandatory public disclosure requirements of the Freedom of Information Act, 5 U.S.C. 552,* and should otherwise be withheld from public disclosure.
>
> * * *
>
> (c) . . . By placing documents in a nonpublic file, the Commission is not making a determination on any claim for privilege. (emphasis added.)

Thus, ANR confuses a request that a document be protected from *mandatory* disclosure under the FOIA with a substantive privilege against such disclosure in a civil suit in federal court.

Exemption from disclosure under the FOIA does not demonstrate or create a privilege for purposes of discovery under the Federal Rules of Civil Procedure. *Kerr v. United States Dist. Ct.*, 511 F.2d 192, 197-8 (9th Cir. 1975), *aff'd on other grounds*, 426 U.S. 394 (1976) (exceptions to disclosure under the FOIA were not intended to create evidentiary privileges for civil discovery); *Pleasant Hill Bank v. United States*, 58 F.R.D. 97 (W.D. Mo. 1973). Indeed the Court of Appeals for the District of Columbia Circuit has recognized that exceptions to mandatory disclosure under the FOIA are not privileges from production under the Federal Rules of Civil Procedure. *Association for Women in Science v. Califano*, 566 F.2d 339, 342 (D.C. Cir. 1977) (holding "[t]he FOIA neither contracts nor expands

existing privileges, nor does it create any new privileges").

ANR's claim to a privilege from discovery under the Federal Rules of Civil Procedure based on the FERC's treatment of filings under the FOIA is without merit and there is no conflict on this issue between the courts of appeal.

4. ANR HAS NOT ESTABLISHED ANY PRIVILEGE PROHIBITING DISCLOSURE OF THE DOCUMENTS.

ANR also attempts to validate its refusal to produce responsive documents by claiming a common law privilege against disclosing "confidential reports" or "self-critical analyses." (Petition at p. 14).[1] Neither "privilege" is applicable.

A. The confidential reports privilege is inapplicable.

ANR's cursory treatment of this argument is telling evidence of the argument's weakness. The confidential reports privilege applies only where discovery of material is sought from the government and protected by a

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[1] ANR's citation to federal cases dealing with federal common law of privilege is inappropriate in this case. This is a diversity case in which no federal law issue has been raised. (Petition at p. 6, n.3). Therefore the law applicable to privileges "shall be determined in accordance with state law." Rule 501, Federal Rules of Evidence. ANR has cited no Texas authority supporting its claim to privilege and this is a sufficient and independent reason for denying the writ.

statutory privilege. ANR fails both parts of this test. First, in order for the privilege to apply the discovery must be directed toward the United States. *Association for Women in Science v. Califano*, 566 F.2d 339, 343 (D.C. Cir. 1977) (holding privilege "unique to" United States). Because Exxon did not seek this discovery from the government, the privilege is not properly invoked. Second, the privilege "must be statutorily based." *Association for Women in Science*, 566 F.2d at 344. ANR has not pointed to any statute upon which its claim is based, and FERC rules dealing with exemption from mandatory disclosure under the FOIA do not create such a privilege. *Association for Women in Science*, 566 F.2d at 342. Therefore ANR is unable to properly assert the confidential reports privilege.

B. The novel self-critical privilege is unnecessary and inapplicable.

(i) This Court should not create a self-critical analysis privilege.

The "self-critical analysis" privilege has never been recognized by this Court. Nor is the privilege generally recognized among lower federal courts. *See, Lloyd v. Cessna Aircraft Co.*, 74 F.R.D. 518 (E.D. Tenn. 1977) (privilege of critical self analysis is "largely undefined and generally unrecognized"); *Noall*, 587 F.2d at 126-7 (declining to recognize privilege in nondiscovery context). Recognition of such a privilege also runs afoul of the general rule that "[m]utual knowledge of all relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). This is particularly true with respect to the creation of novel privileges. As this

Court has stated, privileges "are not lightly created, nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974).

Any common law privilege that withholds this information from the discovery process as well as the trier of fact must have overwhelming countervailing benefits. But the purported benefits here would be of dubious value.

Primary among the benefits supposedly conferred by recognition of the privilege is "to make the self-evaluation process more effective by creating an effective incentive structure for candid and unconstrained self-evaluation." *O'Connor v. Chrysler Corp.*, 86 F.R.D. 211, 218 (D. Mass. 1980). Therefore the privilege is designed to alleviate those who file self-critical reports with the government from the "chilling effect" of knowledge that such reports would be generally disclosed. *See, e.g., Webb v. Westinghouse Electric Corp.*, 81 F.R.D. 431, 433 (E.D. Pa. 1978).

Congress has acted to protect those reports that it deems sufficiently sensitive to warrant confidentiality. Thus Congress has enacted laws prohibiting disclosure of certain information filed in response to federal requirements in a myriad of situations.[2] ANR's invitation to

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[2] The federal government protects by statute a variety of reports filed pursuant to regulation. *See, e.g.*, 35 U.S.C. § 122 (patent applications); 7 U.S.C. § 608 (marketing agreements under Agricultural Adjustment Act); 12 U.S.C. §§ 1091, 1442(a) (certain information collected by banks); 47 U.S.C. § 412 (Federal Communications Commission information disadvantageous to domestic businesses competing with foreign enterprises).

fashion a judicial privilege subsuming and expanding on the reasoned and specific approach of Congress to individual filings is unwarranted.

Additionally, the recognition of a *per se* privilege, rather than a balancing approach, ignores the power of courts to fashion protective orders to ensure against public dissemination of information while protecting the plaintiff's right to prove his or her case. *See, Coates v. Johnson & Johnson*, 756 F.2d 524, 551 (7th Cir. 1985) (recognizing district court's use of protective orders in connection with claim of privilege); *O'Connor*, 86 F.R.D. at 218 (imposing protective order prior to disclosure of affirmative action data). In this case, a protective order already prevents disclosure of sensitive material to the public.

The self-critical analysis privilege also affords inadequate weight to the interests of plaintiffs in discovering relevant evidence. In many instances the government-required compilations provide crucial data necessary to establish the elements of the plaintiff's case. *See, e.g., Webb*, 81 F.R.D. at 433 (finding that "[t]o the extent that the defense of 'self-critical analysis' conflicts with a plaintiff's ability to gather information necessary to prove his or her case, the recognition of such a defense (sic) hampers the enforcement of federal equal employment laws"). Self-critical analyses by their very nature, are extremely probative of the issues they discuss. Further, the fact that the information is critical of the reporter's position provides the same indicia of reliability and veracity that support the exception of admissions against interest from the definition of hearsay under Federal Rule of Evidence 801(d)(2). *See*, 4 J. Weinstein & M. Berger, *Weinstein's Evidence*, ¶801(d)(2)[01] (1990).

In addition, recognition of such a privilege is based on a false premise: the free flow of information to government regulators cannot be accomplished without a blanket assurance that such information will be privileged from discovery. This assumes that those asked to report to the government will conceal, misrepresent, or obfuscate information unless a privilege is created. There is no reason to ascribe such motives to reporters. The government also has numerous and varied means of ensuring that accurate and complete information is provided by regulated entities. Thus the government has mandated criminal penalties for failure to submit required reports under oath,[3] and civil liability for similar infractions. To assume that, in the absence of a "self-critical analysis" privilege, such information would not be available is to underestimate both the honesty of those who report such information and the coercive power of the government.

(ii) Even were such a privilege to be recognized, it would not apply in this case.

Those district courts that have recognized a self-critical analysis privilege have required a party to establish the following elements to avail itself of the privilege:

> First, the information must result from a critical self-analysis undertaken by the party seeking protection; second, the public must have a strong interest in preserving the free flow of the

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[3] *See, e.g.*, 45 U.S.C. § 39 (dealing with duty to report railroad accidents).

> type of information sought; finally, the information must be of the type whose flow would be curtailed if discovery were allowed.

Note, *The Privilege of Self-Critical Analysis*, 96 Harv. L. Rev. 1083, 1086 (1983). ANR has failed to establish that the requested documents meet these criteria.

The FERC's request for data on the various pipelines' outstanding take or pay liability covered pipelines' total take or pay liability under each of their contracts. 52 Fed. Reg. 30334, 30341. The FERC did not instruct pipelines to undertake a self-critical analysis of these liabilities or to evaluate their prior performance under take or pay contracts.

The FERC's request contrasts sharply with the scope and nature of requests that have been previously found to implicate a self-critical analysis privilege. Recognition of the privilege has been confined primarily to the equal employment opportunity context. *Dowling v. American Hawaii Cruises, Inc.*, 133 F.R.D. 150 (D. Hawaii 1990) (recognizing limitation); *O'Connor*, 86 F.R.D. at 214; *Webb*, 81 F.R.D. at 435; *Hoffman v. United Telecommunications, Inc.*, 117 F.R.D. 440 (D. Kan. 1987); *Coates*, 756 F.2d at 551 (acknowledging assertion of privilege but declining review). Courts recognizing the privilege in this context have been quick to point out the peculiar exigencies of filings under equal employment opportunity laws. *See, e.g., O'Connor*, 86 F.R.D. at 216 (focusing on regulations pursuant to executive order that require self-analysis of an employer's deficiencies in the affirmative action plans).

The FERC's request for take or pay data requires no such critical analysis. If, as ANR contends in this action, it has no take or pay liability, it should have reported that it had no liability to the FERC. If ANR reported to the FERC that it had take or pay liability, it should explain the contradiction in its position to the trier of fact in this case. ANR's appraisal of its take or pay liability should not be considered self-critical simply because ANR has taken an inconsistent position in this suit.

ANR also has failed to demonstrate how the free flow of information will be fostered by recognition of the privilege in this case. The FERC's request for data was issued only in support of its promulgation of an order. No supplementation or updates of these reports have been required. Because repeated filings are not required, the issue of ANR's fidelity in subsequent filings is not relevant. Because disclosure of this material can have no chilling effect on future filings where no such filings are required, both the rationale and prerequisite for application of the self-critical analysis privilege are absent.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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